

No. 15395

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IN THE  
**United States**  
**Court of Appeals**  
FOR THE NINTH CIRCUIT

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MILTON E. DAM AND EVERETT S. DAM,  
Co-partners doing business under  
the Firm Name and Style of  
DAM BROTHERS, *Appellants,*

vs.

GENERAL ELECTRIC COMPANY,  
a corporation, *Appellee.*

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*Appeal from the United States District Court  
for the Eastern District of Washington,  
Northern Division*

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APPELLANTS' REPLY BRIEF

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SHAW & BORDEN CO. 320133

**FILED**

AUG - 8 1957



## TABLE OF CASES

	Page
<i>Aetna Life Ins. Co. v. Phillips</i> , 69 F (2d) 901----	3
<i>Bruce Construction Corp'n. v. U. S.</i> for use of <i>Westinghouse Elec. Supp. Co.</i> 242 F (2d) 873--	5
<i>Ericson v. Slomer</i> , 94 F (2d) 437-----	3
<i>Griffith v. Utah Power &amp; Light Co.</i> 226 F (2d) 661-----	4
<i>Herr v. Herr</i> , (Wash.) 211 P (2d) 710-----	3
<i>Hutchins v. Priddy</i> , 103 Fed. Supp. 601-----	3
<i>Nisbet v. Van Tuyl</i> , 224 F (2d) 66-----	2



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It is the appellants' firm belief that in their brief on this appeal they have honestly and faithfully presented to this court a full and fair statement of their claims and of the facts they will be able to establish, if given the opportunity, which will entitle them to equitable relief, and it is also the firm belief of the appellants that the appellee, in its brief, has conversely attempted to present to this court a misleading vision of the issues in this case, evidently on the false hope that through such expert and masterful evasive tactics this court will be led away from the real issues involved.

This is forceably illustrated by the fact that at the appellee's request and under its direction, there has been included in the first ninety-five pages of the record the original and first amended complaints and the various dilatory motions and pleas directed against such original and first amended complaints which were superseded by the second amended complaint upon and under which the motion for summary judgment was granted by the trial court. The inclusion of superseded and withdrawn pleadings and the proceedings had in the trial court thereon, all of which had become *functus officio*, has resulted in confusion and has encumbered the record unnecessarily.

In the case of *Nisbet v. Van Tuyl*, 224 F. (2d) 66, the court said:

“Upon a motion for summary judgment the court, in considering the pleadings upon which the motion is in part based, considers the amended pleadings rather than the prior pleadings superseded by the amended pleadings. An amended pleading ordinarily supersedes the prior pleading is in effect withdrawn as to all matters not restated in the amended pleading, and becomes *functus officio*.”

and in *Hutchins v. Priddy*, 103 Fed. Supp. 601, it is stated that:

“It is hornbook that an amended pleading which is complete in itself and does not refer to a prior pleading supersedes the prior pleading so that it no longer remains a part of the record in an action.”

See also *Aetna Life Ins. Co. v. Phillips*, 69 F. (2d) 901.

And *Ericson v. Slomer*, 94 F. (2d) 437.

And *Herr v. Herr*, (Wash.) 211 P (2d) 710.

## APPELLEE'S ATTEMPTED EVASION OF MATERIAL ISSUES

The appellee in its brief has made a masterful attempt to mislead the court by evading the material issues raised by the record in this case, and to attempt to shift the responsibility to the appellants of trying this case upon affidavits or evidence aliunde the record.

In its argument, commencing on page 30 of its brief, the appellee defines the duty of the District court was "to pierce the formal allegations of the pleadings, reach the merits of the controversy, and determine whether there was any genuine issue as to any material fact". Without unduly extending this reply, the appellants suggest that the court consider the second amended complaint [96-124] and the appellee (defendant's) answer thereto [204-214] together with the affidavit of Harve H. Phipps, Sr. [222-234] submitted in support of appellants' motion for adjournment of hearing on the motion for summary judgment, in which affidavit there are at least twenty-nine specification of genuine issues of material fact all of which required a trial on evidence.

This court in the case of *Griffith v. Utah Power & Light Co.* 226 F. (2d) 661 (syl. 6-13, p. 669) set out the rules governing the duties of the trial courts in



matters of this kind, and if the rules there laid down are adhered to in this case the summary judgment of the trial court cannot be affirmed.

In this same connection the case of *Bruce Construction Corp'n. v. U. S.* for the use of *Westinghouse Electric Supply Co.* 242 F. (2d) 873 places the burden upon the movant for summary judgment to make "*out a convincing showing that genuine issues of fact are lacking*" before the courts will require that the adversary adequately demonstrate by receivable facts that a real, and not a formal, controversy exists.

In an evident attempt to make it appear that the appellee has been prejudiced by the delay in bringing this action the appellee bases an argument upon the fact that it appears that some of the principals, Coffin, Mitchell and Pierce have been dead for some years and possibly upon the affidavit of Roy H. Luebbe [169] "that a search of the General Electric Company record files was conducted. These record files of the General Electric Company are maintained in or near Schenectady, New York. I have been advised that this search failed to reveal any correspondence or other documents concerning the existence of the alleged joint venture between the Dam Brothers and the General Electric Company or its alleged agents." Whatever else may be said of this affidavit of Luebbe's, it certainly does not meet the

standards prescribed by RULE 56(e) of the Federal Rules of Civil Procedure.

But it must be remembered that the appellee in this case is a corporation, which is immune from mortality, and that the death of its officers or agents does not affect its existence, and it must further be remembered that, as convincingly appears from Appellants' Brief on Appeal herein, the appellee acquired vast benefits from the performance by the appellants of their part of the joint venture agreement for which no adequate compensation or remuneration has been made to appellants, and it is continuing to reap such benefits, as demonstrated by its retention of its interests, through its subsidiary corporations.

For all of these reasons the appellants reiterate that the action of the trial court in granting summary judgment was reversible error and the judgment should be set aside and the case remanded for trial.

Respectfully submitted,

PHIPPS & PHIPPS,  
By HARVE H. PHIPPS, SR.

*Attorneys for Appellants.*